

St. Edmund's Roman Catholic Church, Brooklyn, the Dennis Maloney Institute, d/b/a/ St. Edmund's High School, and St. Edmund's Roman Catholic Church, Brooklyn, d/b/a/ St. Edmund's Elementary School, a single employer and Service Employees International Union, Local 74, AFL-CIO, Petitioner. Case 29-RC-9666

September 6, 2002

DECISION ON REVIEW AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On June 8, 2001, the Regional Director for Region 29 of the National Labor Relations Board issued a Decision and Direction of Election in this proceeding (pertinent portions of which are attached as an appendix), directing an election in a unit of the Employer's custodial/maintenance employees. In directing the election, the Regional Director found that the Board's jurisdiction was not precluded by the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), because the employees seeking to organize do not "directly participate in the furtherance of the Employer's religious mission."

On June 21, 2001, the Employer filed a request for review of the Regional Director's Decision and Direction of Election. In its request for review, the Employer argued that the Regional Director's view of Catholic Bishop and its progeny was too narrow and that subsequent Board decisions found the assertion of jurisdiction unwarranted over religious institutions, regardless of the organizing employees' function vis-à-vis the employer's religious mission. The Petitioner filed a request for review on June 19, 2001, contending that the Regional Director erred in finding William Struthers a statutory supervisor. On July 3, 2001, the Board granted the Employer's request for review but denied the Petitioner's request for review.

Having carefully considered the record in this proceeding, we find, contrary to the Regional Director, that assertion of jurisdiction in this proceeding is unwarranted and that the petition for an election among the Employer's custodial workers should be dismissed.

The Employer is a Roman Catholic Church and school located in Brooklyn, New York. The Employer's complex consists of three main parts (1) the Church and its associated buildings, including a rectory and a convent; (2) the elementary school;¹ and (2) the high school, located on the

same city block as the Church/elementary school and connected to these other buildings by a paved path.

All of the custodial employees are employed by the Church. In addition to working in the schools, these employees have performed routine maintenance work in the Church itself and have helped to prepare the Church for important religious holidays. Additionally, they have performed routine maintenance work in both the convent and the rectory. Moreover, because the Church and the elementary school share a common building, whenever the janitors clean the front of the school or its interior hallways, they are in essence servicing these for the Church as well.

Based on these and other facts recited in his Decision and Direction of Election, the Regional Director found, and no party disputes, that the Church, the elementary school, and the high school are a single employer. However, the Regional Director found that jurisdiction over the Employer was not prohibited by *NLRB v. Catholic Bishop of Chicago*, supra, and its progeny. Relying on the Board's decisions in *Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998), and *Hanna Boys Center*, 284 NLRB 1080 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991), the Regional Director concluded that the jurisdictional question did not rest on whether the employer was a religious institution, but rather, the role the specific employees attempting to organize played in effectuating the Employer's religious purpose. Because the custodial employees did not play a direct role in the furtherance of the Employer's religious mission, he held that jurisdiction was proper. We disagree.

Here, it is undisputed that the Church and its related schools are one, single employer. Father Brophy, the Parish Pastor, testified without contradiction that the Church furthers its religious mission through both its weekly religious services and the two associated schools. Further, the schools are located either adjacent to, or in the same building as, the parish Church. It is also undisputed that the custodial employees have performed work in both the Church and its associated buildings.

Generally, the Board will not assert jurisdiction over nonprofit, religious organizations. *Motherhouse of the Sisters of Charity*, 232 NLRB 318 (1977); *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037 (1974). In *Riverside Church*, 309 NLRB 806 (1992), and *Faith Center-WHCT Channel 18*, 261 NLRB 106 (1982), the Board reaffirmed that it will not assert jurisdiction over religious institutions which operate "in a conventional sense using conventional means" and declined to assert jurisdiction over secular employees of religious institutions, without whom the employers could not accomplish their religious missions.

¹ The elementary school is located in the same building as the Church. The center of the St. Edmund's Church/elementary school building houses the Church with the school's classrooms surrounding the Church.

The cases relied upon by the Regional Director are inapposite. *Hanna Boys Center* involved a home for troubled boys and *Ecclesiastical Maintenance Services* involved a separate corporation, albeit founded by the Roman Catholic Church, to perform cleaning and maintenance services for church operated properties. Unlike the present case, neither concerned an employer which was itself a religious institution.

Instead, the Board's decisions in *Faith Center* and *Riverside Church* are squarely on point. In *Faith Center*, the Board found that the assertion of jurisdiction over a church employer was unwarranted where the union was seeking to organize a unit of the employer's broadcast engineers. In declining to assert jurisdiction, the Board reasoned that the church's broadcasts were "essentially an electronic extension of its church" and remained unpersuaded by the fact that the engineers performed a purely secular function. See *Faith Center*, 261 NLRB at 107. Similarly, in *Riverside Church*, the Board declined to assert jurisdiction over a church employer where the union sought to represent a unit of service and maintenance employees employed by and working at the church and its related facilities. See *Riverside*, 309 NLRB at 807.

Here, given the close integration between the Church and the schools, the undisputed testimony that the schools are part of the Church's religious mission, the Regional Director's single employer finding, and the fact that the Church directly employs all of the employees seeking representation, we find that the assertion of jurisdiction is unwarranted.²

Accordingly, the Regional Director's decision is reversed and the petition is dismissed.

APPENDIX

REGIONAL DIRECTOR'S REPORT DECISION AND DIRECTION OF ELECTION

2. St. Edmund's Roman Catholic Church, Brooklyn, the Dennis Maloney Institute, d/b/a St. Edmund's High School, and St. Edmund's Roman Catholic Church, Brooklyn, d/b/a St. Edmund's Elementary School, referred to during the hearing as

² In voting to reverse the Regional Director's decision, Member Liebman agrees with her colleagues that, under current law, jurisdiction may not be asserted in this case. While she did not join then-Chairman Gould and Member Fox in voting to overrule the Board's decision in *Riverside Church*, supra, in the later *Ecclesiastical Maintenance Services*, supra (which, in any event, was not necessary to the resolution of that case), upon further reflection she questions whether *Riverside Church* is sound precedent. In her view, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (involving teachers), does not compel the Board to decline jurisdiction over custodial employees of church-operated schools.

"a single employer or joint employers,"¹ herein collectively called the Employer, took the position that the Board lacks jurisdiction under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), which held that the Board does not have jurisdiction over teachers employed by church-operated schools. In addition, the Employer objected to "the nomenclature, 'St. Edmund's Roman Catholic Church d/b/a St. Edmund's Elementary School,'" claiming that they are "one and the same entity." As its witness, the Employer called Father Edward Brophy, a Roman Catholic priest who is Pastor of the parish.

The Service Employees International Union, Local 74, AFL-CIO, (the Petitioner), took the position that the Board has jurisdiction over the Employer, because the employees it seeks to represent perform "cleaning and maintenance work, that has nothing to do with religious faith or religious practices." As its witnesses, the Petitioner called Dwain Johnson, a maintenance worker at Dennis Maloney Institute d/b/a St. Edmund's High School, (the high school or the institute); John Malone, a maintenance worker at St. Edmund's Elementary School, (the elementary school); William Struthers, who is alleged by the Employer to be a 2(11) supervisor; and Barry White, business agent for the Petitioner, who testified briefly regarding the Petitioner's representation of maintenance employees at other facilities owned and operated by the Catholic Church.

The parties stipulated that the Employer's gross annual revenues, with or without contributions and donations, are over \$1 million, and that it purchases and receives goods, products, and materials valued in excess of \$5000 annually directly from firms located outside the State of New York.

The Employer argues that the instant case falls under the holding in *NLRB v. Catholic Bishop of Chicago*, supra, where the United [States] Supreme Court determined that the exercise of the Board's jurisdiction over lay faculty members employed by Catholic secondary schools could present a "significant risk that the First Amendment will be infringed." *Catholic Bishop*, supra at 491. In light of "the critical and unique role of the teacher in fulfilling the [religious] mission of a church-operated school," the Supreme Court was concerned that by requiring church-operated schools to bargain with unions representing teachers, and by delineating mandatory bargaining subjects with respect to teachers, the Board might encroach upon the schools' right to exercise control over their religious function. *Catholic Bishop*, 440 U.S. at 490. In addition, the Court was fearful that religious schools accused of unfair labor practices might assert that their "challenged actions were mandated by their religious creeds," necessitating a Board inquiry into the good faith of the schools' defenses. *Catholic Bishop*, supra at 490. In order to avoid the possibility of having to invalidate a portion of the NLRA on First Amendment grounds, the Court decided the case on an alternative theory, concluding that the Board could not exercise jurisdiction over parochial school teachers in the absence of a "clear

¹ Neither party took a position at the hearing as to whether the Employer is a single employer or joint employers. In its brief, the Employer contended for the first time that the Employer is a single-integrated enterprise. For the reasons discussed infra pp. 22-24 [omitted from publication.] I agree with the Employer and find that the Employer is a single-employer.

expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act.” *Catholic Bishop*, supra at 491–492.

One of the concerns expressed in *Catholic Bishop* was later resolved against a church-operated school which argued that the First Amendment precluded government inquiry into an alleged discriminatory discharge that the school claimed to be religiously motivated. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). The Supreme Court ruled that the Ohio Civil Rights Commission “violate[d] no constitutional rights by merely investigating the circumstances of the discharge . . . if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.” *Dayton Christian Schools*, 477 U.S. at 624. The Court noted that “[e]ven religious schools cannot claim to be wholly free from some state regulation.” *Dayton Christian Schools*, *ibid*. In several of its more recent cases, the Supreme Court has placed its imprimatur on government aid to religious schools entailing at least as much church-state entanglement as would the assertion of Board jurisdiction. For example, the Court reinstated a program previously found unconstitutional, in which public school teachers, monitored by the New York City Board of Education, provide remedial education in religious schools. *Agostini v. Felton, Chancellor, Board of Education of the City of New York*, 521 U.S. 213, 2015 (1997), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Last year, the Court held that a government program which loans educational materials and equipment to religious schools does not violate the Establishment Clause, even though government monitoring was insufficient to prevent the diversion of materials and equipment for religious purposes. *Mitchell v. Helms*, 530 U.S. 793 (2000), overruling *Meek v. Pittenger*, 95 S.Ct. 1753 (1975); *Wolman v. Walter*, 97 S.Ct. 2593 (1977).² The Court has also held that supplying a publicly paid sign-language interpreter to a deaf student attending a Roman Catholic high school, to facilitate the understanding of everything from mathematics to Mass, does not violate the Establishment Clause. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In *Agostini v. Felton*, the Court observed that “[i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two.” 521 U.S. at 215 (1997).

In the late 1970s, one of the first Board cases to apply *Catholic Bishop* interpreted it as permitting Board jurisdiction over lay faculty members employed by a Catholic secondary school which was deemed not to be “church-operated,” because it was administered by an independent lay board of trustees. *Bishop Ford Central Catholic High School*, 243 NLRB 49 (1979), enf. denied 623 F.2d 818 (2d Cir. 1980). The Board overruled *Bishop Ford* in *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987), pointing out that the Supreme Court’s analysis in *Catholic Bishop* “did not focus on the schools’ di-

rect affiliation with religious organizations . . . [but on] the purpose of the school, the role of the teacher in effectuating that purpose, and the potential effects of the Board’s exercise of jurisdiction.” *Jewish Day School*, 283 NLRB at 760. Accordingly, the Board construed *Catholic Bishop* to preclude it from asserting its jurisdiction “where a union seeks to represent a unit of teachers in a school whose purpose and function in substantial part are to propagate a religious faith,” regardless of whether the school is “church-operated.” *Jewish Day School*, 283 NLRB at 761; accord: *Nazareth Regional High School*, 283 NLRB 763 (1987).

Conversely, the Board has found it appropriate under *Catholic Bishop* to exercise its jurisdiction over employers which are church-operated, but whose purpose and function, and the tasks performed by their employees, are primarily secular. For example, *Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998) (EMS)³ involved an employer owned and operated by the Roman Catholic Archdiocese of New York for the purpose of “assist[ing] in the fulfillment of the religious, educational and other charitable purposes of the . . . Archdiocese . . . which are carried out by the churches, schools, hospitals, and other institutions owned, operated, supervised or controlled by . . . the Roman Catholic Church within the Archdiocese,” by providing “cleaning, maintenance, painting and repairing services for these institutions.” *EMS*, 325 NLRB at 629. In exercising jurisdiction over EMS’s service and maintenance employees (whose functions were similar to those of the unit employees in the instant case), the Board reasoned that “the critical inquiry addressed by the Court in *Catholic Bishop* is the employees’ role in the participation of religious activities, not in merely making them possible . . . [T]he cleaning and maintenance employees employed by the Employer, while perhaps assisting in the Church’s religious activities, do not participate in them.” *EMS*, 325 NLRB at 631. The Board has exercised jurisdiction over a wide range of church-operated employers whose employees are not directly involved in effectuating their religious missions. See, e.g., *University of Great Falls*, 331 NLRB 1663 (2000) (faculty of university founded by a Catholic religious order); *Upstate Home for Children, Inc.*, 309 NLRB 986 (1992) (nurses employed by residential school for mentally retarded children, affiliated with the American Baptist Church); *Salvation Army William Memorial Residence*, 293 NLRB 944 (1989), enf. w/o opinion, *Salvation Army*, 923 F.2d 846 (2d Cir. 1990) (kitchen and maintenance workers at a residential facility for mature adults, under the direction and control of a Salvation Army minister); *Salvation Army of Massachusetts Dorchester Day Care Center*, 271 NLRB 195 (1984), enf. 763 F.2d 1 (1st Cir. 1985) (teachers, janitor, cook and social worker at child care center operated by the Salvation Army); *Volunteers of America, Los Angeles*, 272 NLRB 173 (1984), enf. 777 F.2d 1386 (9th Cir. 1985) (alcoholism specialists, cooks and janitors employed by an alcoholism program operated by Volunteers of America (held to be a bona fide Christian church)); *St*

² The Employer’s brief relies on a portion of *Catholic Bishop* in which the Supreme Court’s discussion of the church-state entanglement problem was based on its holdings in *Meek* and *Wolman*, which are no longer good law. Brief of Employer, p. 14.

³ In *EMS*, two Board members indicated that they were in favor of overruling *Riverside Church in the City of New York*, 309 NLRB 806 (1992), in which the Board declined to exercise jurisdiction over the church’s maintenance workers. The *Riverside* case, relied on by the Employer herein, is anomalous in that it does not cite or discuss *Catholic Bishop*, but employs the Board’s pre-*Catholic Bishop* analytic framework.

Louis Christian Home, 251 NLRB 1477 (1980), enf'd. 663 F.2d 60 (8th Cir. 1981) (child-care workers, maintenance employee and storeroom clerk employed by emergency residential treatment center for battered, abused, and neglected children, operated by the Christian Church Disciples of Christ); *Harborcreek School for Boys*, 249 NLRB 1226 (1980) (child-care workers, teachers, teachers aides, nurses, kitchen workers, laundry workers, and maintenance workers employed by a school for troubled boys owned and operated by a Catholic diocese).

Particularly instructive in resolving the instant case is *Hanna Boys Center*, 284 NLRB 1080 (1987), enf'd. 940 F.2d 1295, 1302 (9th Cir. 1991), cert. denied 504 U.S. 985 (1992), involving two bargaining units of nonteachers at a Catholic residential facility for boys. One of these bargaining units included "child care workers, recreation assistants, cooks, cooks helpers, and maintenance employees including plumbers, electricians, gardeners, and custodians . . . excluding . . . professional employees, priests, nuns, and religious brothers, guards and supervisors as defined in the Act." *Hanna Boys Center*, 284 NLRB at 1080 fn. 1. The duties of child-care workers included bringing the children to chapel to say their morning prayers, "select[ing] a boy to say the evening prayer," and "[t]eaching values: ethical principles, religious observances." *Hanna Boys Center*, 284 NLRB at 1081, 1082. However, since the child care workers and other unit employees were not teachers, and did not have a crucial role in fostering the Center's religious mission, the Board found that "[t]he sensitive First Amendment issues surrounding the assertion of jurisdiction over teachers noted by the Court in *Catholic Bishop* are not involved in the assertion of jurisdiction over the child-care workers and other unit members in the present case." *Hanna Boys Center*, 284 NLRB at 1083. Ultimately, pursuant to an election conducted prior to the Board's decision, a union was certified to represent the above-described unit, and the Board issued a bargaining order after the Center "tested cert." *Hanna Boys Center*, 293 NLRB 359 (1989).

In enforcing the Board's bargaining order, the Ninth Circuit declared that the Board's exercise of jurisdiction was "clearly constitutional." *Hanna Boys Center*, 940 F.2d 1295, 1302 (Ninth Cir. 1991). The court's discussion of the First Amendment implications of Board jurisdiction is summarized here, in order to clarify the potential constitutional issues at stake. The Ninth Circuit's analysis began with the observation that the Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Hanna Boys Center*, 940 F.2d at 1303 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)). The Court then applied the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*: to avoid an Establishment Clause violation, "the Board's application of the NLRA to Hanna's non-teaching employees (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not foster excessive state entanglement with religion." *Hanna Boys Center*, 940 F.2d at 1303 (citing *Lemon*, 403 U.S. at 612-613). Since the purpose and primary effect of extending the Act's protection to employees are "clearly secular," the Ninth Circuit's analysis focused on "*Lemon's* third, 'entanglement' prong." *Hanna Boys Center*, 940 F.2d at 1303.

Under *Lemon*, there are "three factors to be weighed in determining excessive entanglement: the character and purpose of the institution that [is] benefited, the nature of the aid that the State provides, and the resulting relationship between government and the religious authority." *Hanna Boys Center*, 940 F.2d at 1304 (quoting *Lemon*, 403 U.S. at 615). With regard to the first of these factors, the Ninth Circuit found that "the Catholic faith of [the Center's] founders is woven thoroughly into the institution." *Hanna*, 940 F.2d at 1304. However, as for the second factor, the "nature of the aid the State provides" (or in *Hanna*, the "nature of the activity the government mandates"), the court found that the employees at issue did not conduct religious services, teach religion, or further Hanna's religious mission. *Hanna*, *ibid.* Accordingly, any labor relations issues which would arise with respect to these employees "should not involve the Board in issues of theology . . . and should involve the Board minimally, if at all, in Hanna's religious mission." *Hanna*, *ibid.* The court pointed out that Board jurisdiction would not "render any benefit to the Catholic religion or any other religion, or advance non-religion or religion generally." *Hanna*, *ibid.* Furthermore, there was no evidence that the religious beliefs of either *Hanna* or the *Roman Catholic Church* "would be affronted by unionization or collective bargaining." *Hanna*, *ibid.*

Turning to the third factor, the "resulting relationship between government and the religious authority," the court noted that Board jurisdiction would "require governmental involvement only with respect to specific charges which may be filed on behalf of these employees. It will not involve the Board in continuing or systematic monitoring of the Church's activities and should not involve monitoring the religious aspects of Hanna's activities at all. Board involvement will not create the reality or the appearance of the government's supervising or collaborating with the Church." *Hanna*, 940 F.2d at 1304. When the court weighed these three factors, it concluded that "Board jurisdiction here does nothing to 'establish' religion. Nor does Board jurisdiction here present a threat to government neutrality with respect to religion . . . [or] create 'active involvement of the sovereign in religious activity' . . . or continuing government surveillance of the type the Supreme Court condemned in *Lemon* . . . *Hanna*, 940 F.2d at 1305.

With respect to *Hanna's* Free Exercise argument, the Ninth Circuit applied the traditional test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), which "requires the weighing of three factors: (1) how much Board jurisdiction will interfere with the exercise of religious beliefs; (2) the existence of a compelling or overriding state interest justifying a burden on religious beliefs; and (3) whether accommodating those beliefs would unduly interfere with the fulfillment of the government interest." The court held that "Board jurisdiction here will not interfere with the free exercise of religious beliefs of anyone at Hanna. Catholic doctrine has no objection to unionization or collective bargaining. The pervasively secular nature of these employees' duties ensures that Board involvement in labor disputes will be confined to the secular aspects of Hanna's operations." *Hanna*, 940 F.2d at 1306. The court then balanced the "minimal showing of any impact on religious belief or practice" against "the compelling governmental interest in 'promo[ting] the peaceful settlement of industrial disputes by

subjecting labor-management controversies to the mediatory influence of negotiation.” *Hanna*, 940 F.2d at 1306 (quoting *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964)). Accordingly, the Ninth Circuit found that extending the Act’s protection to the disputed employees would not violate the Free Exercise Clause. *Hanna*, supra at 1306.

In a recent case, the Board found that even where a hospital was operated by the Seventh Day Adventist Church, whose teachings “prohibit its members from participating in labor unions, paying dues to labor unions, or operating with the presence of labor unions,” the government interest in preventing labor strife and extending the NLRA’s protections to employees was sufficiently compelling to justify the Board’s exercise of jurisdiction over the hospital’s registered nurses. *Ukiah Valley Medical Center*, 332 NLRB 602 (2000).

The record reflects that St. Edmund’s Parish includes the church and elementary school, which occupy the same building, the high school, a rectory and two convents. There is no evidence regarding the location of the two convents; the other buildings are all on the same block in Brooklyn. The church and elementary school share the same front entranceway and entrance corridor, although the schoolchildren usually enter through a side door. The Employer emphasized that when the elementary school custodians clean the sidewalk in front of the school, shovel the snow, or clean the entrance corridor, they are de facto performing the same service for the church. Photographs of the church/elementary school and high school, which were offered into evidence by the Employer, reveal the prominence of imagery associated with Roman Catholicism.

Father Edward Brophy testified that as Pastor of St. Edmund’s Parish since December 2000,⁴ he is its administrator and spiritual leader. He is ultimately responsible for the operation of the elementary school, the rectory, and the church. The Pastor is one of the five trustees of the St. Edmund’s Parish Corporation, the others being the Bishop and Vicar General of the Brooklyn Diocese and two lay parishioners selected by the pastor.⁵ In addition, Pastor Brophy is the chairman of the board of trustees and sole member⁶ of the Dennis Maloney Institute d/b/a St. Edmund Preparatory High School. Father Brophy is in charge of hiring the principals of both the high school and elementary school, and his signature appears on employment contracts with the two principals. Pastor Brophy has to approve all hiring and firing decisions concerning all elementary school

personnel, including the teachers. At the high school, by contrast, the principal hires the teachers and staff. Father Brophy leaves the day-to-day operation of the high school to the principal, the assistant principal or vice principal, and the teachers.

St. Edmund’s Parish owns the land on which the schools and other buildings are located. It appears from the record that it also owns the buildings themselves. The parish permits the high school to use the building it occupies on condition that it be maintained properly and used for a Catholic high school. Pastor Brophy maintained that the parish does not charge rent to the school, but that there is “a transfer of funds from the school to the parish.” The frequency and amount of this transfer of funds was not mentioned. The high school also purchases bookkeeping services from the parish; one bookkeeper manages the accounts for the high school, the elementary school, and “the rest of the church.” In addition, the pastor pays the utility bills for the church/elementary school, rectory, high school, and convents. Only the pastor can sign checks on the behalf of the church and the two schools, although these entities have three separate bank accounts. The tuition money charged by the high school is kept in its separate account and used to operate the school. The institute pays its teachers’ salaries directly.

The custodians/janitors who work at the high school are on the payroll of St. Edmund’s Roman Catholic Church, and the high school purchases the janitorial services from the parish. The pastor, as chairman of the institute, transfers an unspecified amount of money (which may or may not correspond with the janitors’ wages) from the Institute’s account to the church’s account to pay for these janitorial services. In addition, William Struthers receives two paychecks each week, from both the church and the elementary school. John Malone testified that at various times, he has received paychecks drawn on the account of the church, the elementary school, and the high school. Both he and Johnson have been transferred back and forth between the high school and elementary school, and have occasionally performed work in the parish’s other buildings. Struthers performs work in all the buildings.

Father Brophy testified that the high school “exists, first of all, for the development and the formation and the spread of the Roman Catholic faith.” Similarly, the primary purpose of the elementary school is “the transfer of the faith, and worship of the faith.” These “ultimate purpose[s]” take precedence over the secondary goal of teaching secular subjects. With respect to religious studies, the elementary school prepares students to receive the sacraments of First Communion, Penance, and Confirmation, in the church contained within the same building. The elementary school also provides a religious education program for children who do not attend St. Edmund’s. The students at both the elementary and high schools use the church for such purposes as Mass, Confession, prayer services, and the observance of Lent. Sometimes the parishioners use the schools’ facilities.

Not all the students at the two schools are Roman Catholics, however, and the record does not disclose whether attendance is required at church or at the elementary school’s religious training program. Father Brophy did not know whether classes such as mathematics, chemistry, biology, or history, contain a specific religious component, and he did not mention whether

⁴ Father Brophy testified that he became the administrator of the parish on December 1, 2000, and was canonically installed as the pastor on January 14, 2001. The Bishop of Brooklyn appointed him as pastor on October 31, 2000. He was ordained a Catholic priest in 1993, having previously served as a librarian and English teacher at two Catholic high schools.

⁵ The church’s certificate of incorporation reflects that its original trustees held the same titles, in 1925.

⁶ The institute’s corporate bylaws provide that the trustees are the governing body of the Corporation, charged with its administration, the effectuation of its corporate purposes, and the stewardship of its property, and that the Member’s exclusive powers include appointing trustees and officers, approving the trustees’ long-range strategic plans, reviewing financial statements submitted by the trustees, and approving any change in the philosophy and mission of the Corporation.

the high school provides a religion class or any religious training. The pastor testified that he does not know of any faculty members who are not Catholics, but he did not indicate whether adherence to the faith is a requirement for teachers, or whether the faculty includes members of the clergy. Based on the record as a whole, however, I find that the elementary and high schools have a predominant religious purpose and mission.

Nevertheless, there is no evidence that the custodial/maintenance employees and laborers are directly involved in effectuating the schools' religious mission. Unit employees Johnson and Malone testified that they clean the grounds at the two schools, pick up papers, sweep, mop, clean the cafeterias and bathrooms, change light bulbs, clean and empty garbage cans, shovel snow, unclog toilets, fix leaky sinks, and make other basic repairs. They are sometimes called upon to clean the parking area used by teachers, principals, and staff. In addition, they occasionally perform cleaning or light maintenance tasks at the rectory and convents. Before and after Christmas, Easter and Confirmation, they help to clean and maintain the church itself, to prepare the church and clean up afterwards. In addition, Father Brophy stated that the custodians maintain the heating system in the building occupied by both the church and the elementary school. Father Brophy indicated that the "custodial staff, sexton, whoever," clean the church regularly. However, it is not clear from Pastor Brophy's testimony whether the quoted phrase refers to members of the petitioned-for bargaining unit, which consists only of employees who regularly work at the elementary school and high school.

Father Brophy asserted that the custodial/maintenance employees and laborers assist him in fulfilling his obligation to ensure that the buildings of the parish are maintained in good order, so that they can be used by both the schoolchildren and parishioners in the service of the Roman Catholic faith. The Employer submits that under these circumstances, cleaning a corridor cannot be viewed as secular. However, unit employees have no role in the "development," "formation," "spread," "transfer" or "worship" of the Roman Catholic faith. The custodial/maintenance employees and laborers who work at the two schools do not teach the children, or help to instill religious beliefs in them. Their interaction with students is nonexistent or minimal. Unit employees are not required to attend mass as part of their job duties. The Employer does not question them about their religious faith or affiliation, either at the time of hire or afterwards. Some are not Catholics.

Nevertheless, Father Brophy maintained that he "would expect that their behavior is not going to, in any manner, shape or form, contradict the Catholic faith." Even when the unit employees are on their own time, he added, he "would expect that there would not be public scandalous behavior which would offer a direct confrontational contradiction to the teaching of the Church." According to Pastor Brophy, such behavior could result in "discipline up to and including discharge." In addition, Pastor Brophy professed himself unable to bargain over a number of hypothetical future bargaining proposals that could be made by Petitioner in its representation of the unit. These included any proposals affecting the scheduling of mass, proposals to resolve grievances through anything other than the Catholic Church's internal dispute resolution procedures, and

any proposals "that violated the Church's faith and morals," such as a hypothetical demand for a health and welfare plan which could theoretically include birth control, abortion coverage, benefits for significant others, and the inclusion of homosexuals in a family unit.

Under cross-examination, Pastor Brophy admitted that he has never communicated to the custodial/maintenance employees or laborers the expectation that they conform their behavior to the tenets of the Catholic Church. In addition, he conceded that he has never asked custodial or other staff whether they have ever practiced birth control, undergone abortions, had homosexual relations, or had "significant others." Pastor Brophy testified that the lay faculty members at the high school are represented by a union, and that his predecessors never told him of any problems with negotiations. He was aware that teachers at some other Catholic schools are unionized, but he did not know of any instances where unions representing them had demanded birth control and abortion funding, or holidays, or vacations that interfered with the operations of the church.

Pastor Brophy will be participating in negotiations with the union representing the high school teachers.

In sum, the record evidence establishes that the employees in the petitioned-for unit, like those in *EMS* and *Hanna*, do not directly participate in the furtherance of the Employer's religious mission. The concerns expressed by the Employer regarding possible bargaining proposals by Petitioner are purely hypothetical. Moreover, the Board cannot compel the Employer to agree to a proposal offensive to Roman Catholicism; it can only require the Employer to bargain in good faith. Accordingly, I find that the exercise of Board jurisdiction is not precluded by the *Catholic Bishop* line of cases.

Discussion of Single-Employer Issue

The four operative criteria used to determine whether two separate employers constitute a single employer or single integrated enterprise are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *JMC Transport*, 283 NLRB 554, 555 (1987). However, no one of these factors is controlling, and it is not necessary for all four of these factors to be present. *JMC*, 283 NLRB at 555; *Blumenfeld Theatres Circuit*, 240 NLRB 206 (1979), *enfd.* 626 F.2d 865 (9th Cir. 1980). Single-employer status depends on all the circumstances of the case. *Emsing's Supermarket*, 284 NLRB 302, 303-304 (1987); *Blumenfeld*, *supra* at 215. Accordingly, the Board has "on several occasions made a finding of single employer status in the absence of a common labor relations policy, and even when it had been affirmatively shown that each of two corporations held to be a single employer established its own labor relations policy." *Blumenfeld*, 240 NLRB at 215 (citing *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1960)); see *Jerry's United Super*, 289 NLRB 125, 135 (1988). Similarly, a single-employer finding may be made where there is "little or no employee interchange." *Blumenfeld*, 240 NLRB at 215; see *Jerry's United Super*, 289 NLRB 125, 135 (1988); see also *Soule Glass & Glazing Co.*, 246 NLRB 792, 795 (1979).

In the instant case, the operations of the church, elementary school, and high school are interrelated. They share the same

overall purpose: the propagation of Roman Catholicism. Students from both schools use the church, and parishioners sometimes use the school's facilities. The church and elementary school share the same building, and all three entities are on land owned by the St. Edmund's Parish, which is part of the Roman Catholic Diocese of Brooklyn. The schools and church share the same bookkeeper. Although custodians in the petitioned-for bargaining unit are primarily assigned to either the elementary or the high school, the record reflects that they are sometimes called upon to help out in other buildings, including the church. Most have received at least some of their paychecks directly from the church. In the past, at least two bargaining unit members have been transferred between the high school and elementary school.

In addition, Pastor Brophy has managerial duties with respect to all three entities, and it appears that he will have primary responsibility for labor relations policy. For example, the Pastor stated that he will be involved in labor negotiations with the union representing the lay high school teachers. He has to approve all hiring and firing decisions concerning the elementary school teachers and staff, as well as the custodial staff assigned to the church and the two schools. His testimony regarding hypothetical future bargaining proposals by Petitioner implies that if Petitioner prevails in a Board election, Pastor Brophy will also participate in labor negotiations regard-

ing the custodial/maintenance employees and laborers who work in the high school and elementary school.

Based upon the stipulations of the parties, and the record as a whole, I find that the Employer is a single integrated enterprise, that it is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated that Service Employees International Union, Local 74, AFL-CIO, (the Petitioner), is a labor organization within the meaning of Section 2(5) of the Act. Based upon the stipulation of the parties, and the record as a whole, I find that the Petitioner is a labor organization within the meaning of the Act. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner is seeking an election in a unit consisting of all full-time and regular part-time custodial/maintenance employees and laborers⁷ employed by the Employer at St. Edmund's High School, located at 2472 Ocean Avenue, Brooklyn, New York, and at St. Edmund's Elementary School, located at 1902 Avenue T, Brooklyn, New York, excluding all clerical employees, teachers, guards and supervisors as defined in the Act.

⁷ During the hearing, the unit employees were also referred to as janitors.